BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMY L. BURROUGHS	)	
Claimant	)	
VS.	)	
	)	Docket No. 170,497
IBP, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent and claimant both appealed Administrative Law Judge Jon L. Frobish's March 4, 1998, Award. The Appeals Board heard oral argument by telephone conference on October 14, 1998. Jeffrey K. Cooper was appointed Appeals Board Member Pro Tem to serve in place of Appeals Board Member Gary M. Korte who recused himself from this proceeding.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Gregory D. Worth of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations contained in the award.

ISSUES

The Administrative Law Judge awarded claimant a 15 percent permanent partial general disability limited to her permanent functional impairment, found claimant's average weekly wage should be based on a six-day work week, and denied respondent's request to assess the cost of the May 19, 1995, preliminary hearing against the claimant.

Claimant contends she is entitled to a higher permanent partial general disability based on a work disability. Respondent, however, contends the Administrative Law Judge's Award should be affirmed except that claimant's average weekly wage should be based on a five-day work week with no other compensation and the cost of the May 19, 1995, preliminary hearing should be assessed against the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

FINDING OF FACT

(1) Claimant injured her bilateral upper extremities while working for the respondent performing the job identified as tri-tips.

(2) The tri-tips job required claimant to trim meat from the sides of bones and then cut the bones apart. This job was fast paced requiring claimant to utilize both hands repetitively using a hook in her left hand and a knife in right hand.

(3) Claimant started working for the respondent on July 16, 1990, and as early as September 1990, she started to have tingling and numbness in her hands and burning in her shoulders.

(4) Respondent provided medical treatment for claimant's symptoms first with respondent's physician, Edward G. Campbell, M.D., in Emporia, Kansas, and then with orthopedic surgeon Lowry Jones, Jr., M.D., in Kansas City, Missouri.

(5) Claimant was treated conservatively by Dr. Jones with cortizone injections, medication, and physical therapy.

(6) After Dr. Jones determined claimant was no longer in need of further treatment, claimant remained symptomatic and was referred by her attorney to Daniel R. Wilson, M.D., a physical medicine and rehabilitation physician in Topeka, Kansas.

(7) Dr. Wilson saw claimant on November 23, 1992, and had claimant undergo a nerve conduction study. He diagnosed claimant with bilateral carpal tunnel syndrome and myofascial pain syndrome of the bilateral scapula-thoracic regions. The doctor recommended claimant be taken off work and participate in both occupational and physical therapy programs.

(8) As a result of a preliminary hearing held on December 9, 1992, the Administrative Law Judge, at the request of the claimant, appointed Dr. Wilson as claimant's authorized treating physician. Dr. Wilson took claimant off work on December 17, 1992, had her

participate in a physical therapy program, a home stretching and flexibility program, prescribed anti-inflammatory medication, and prescribed trigger point injections of her shoulder and neck area for the myofascial pain.

(9) After the claimant failed to respond to the conservative treatment for the carpal tunnel syndrome, Dr. Wilson referred her to plastic surgeon Frederick A. Hutton, M.D., of Topeka, Kansas. Dr. Hutton performed a right carpal tunnel release on April 27, 1993, and a left carpal tunnel release on June 3, 1993. Dr. Hutton returned claimant to work on July 6, 1993, to light duty with the restriction of no tight gripping bilaterally.

(10) On July 7, 1993, claimant returned to Dr. Wilson for follow-up treatment. He placed additional work restrictions on claimant of no working above waist level and no pushing, pulling, or lifting over 20 pounds with her upper extremities.

(11) Claimant remained symptomatic while performing the tri-tips job at a reduced pace. Finally, Dr. Wilson reduced her work activity to four hours per day.

(12) On August 20, 1993, claimant reported increased pain and discomfort in her neck and shoulder areas. However, her hands were doing well at that time. Because of the increased pain and discomfort that claimant was experiencing in her neck, Dr. Wilson again took claimant off work.

(13) At Dr. Wilson's direction, claimant underwent a functional capacity evaluation (FCE) on February 3, 1994.

(14) On April 12, 1994, taking into consideration the FCE's results, Dr. Wilson examined claimant for a permanent functional impairment rating and permanent work restrictions.

Dr. Wilson was the only physician to testify in this case and no other physician's opinions on permanent functional impairment or work restrictions were stipulated into the record as admissible evidence.

Dr. Wilson, utilizing the AMA Guides to Evaluation of Permanent Impairment, Fourth Edition, found claimant to have a whole person functional impairment of 16%.

The doctor's permanent work restrictions were "sedentary work level with no pulling, pushing or lifting over 10 lbs. No repetitive upper extremity work and no chest height to overhead activity."

Dr. Wilson expected claimant to have generalized discomfort in her shoulders and scapular regions as well as intermittent discomfort in her hands.

(15) The last time Dr. Wilson saw claimant was March 25, 1996; claimant continued to have pain and discomfort in her shoulder girdle region. The doctor also found the claimant

with probable depression and referred her to a psychologist for an MMPI evaluation. The doctor continued claimant on medication and the home exercise program.

(16) Dr. Wilson's final report dated May 15, 1996, reported the psychologist's evaluation found chronic pain with general psychological features including acute anxiety and depression.

(17) The respondent never offered claimant a job within the permanent restrictions assigned by Dr. Wilson. In an effort to return claimant to work, a vocational rehabilitation plan was developed by vocational rehabilitation counselor Dan Goldstein. The goal for the plan was to return claimant to a job as a human service worker. The human service worker job category included jobs working with people that have physical and mental needs as well as the welfare of the sick, elderly, young, or handicap individuals.

The vocational rehabilitation plan was for claimant to complete one semester of college and then to seek employment with the assistance of the vocational rehabilitation counselor.

(18) Claimant also obtained a GED, after she was unable to return to work for respondent and before she started her first semester of college, pursuant to the vocational rehabilitation plan in the fall of 1994 at Emporia State University.

(19) Claimant testified, during her first semester of college, she realized one semester would not be enough education for her to qualify to find suitable employment.

Therefore, she enrolled in an another semester of college. Claimant also testified, that although she did not have the vocational rehabilitation counselor assist her with a job search, she applied for jobs on numerous occasions but was unable to find suitable employment.

(20) Claimant last testified in this case at the regular hearing held on July 28, 1995. At that time, claimant was receiving welfare benefits and was planning on continuing her college education in the Fall of 1995 if she was not able to find suitable employment.

Further information concerning claimant was developed during vocational rehabilitation counselor Dan Goldstein's deposition testimony on December 9, 1996. At that time, claimant was participating in a vocational rehabilitation program developed by the Kansas Department of Social and Rehabilitation Services (SRS). The objective of the program was for claimant to obtain a bachelor's degree to qualify claimant for a human service job with juveniles. However, the vocational rehabilitation counselors for SRS, after reviewing claimant's vocational test scores, doubted whether she had the capabilities of completing a bachelor's degree program.

Mr. Goldstein interviewed claimant on November 25, 1996, in preparation of a work disability assessment report. At that time, claimant was attending her fifth semester of college and had attended one additional session of summer school. She was also enrolled for the Spring 1997 semester. She had completed 47 college credit hours with a cumulative grade point average of 2.32.

Claimant was receiving public assistance, food stamps, and a medical card from SRS. Also, she received PELL grants and student loans to help her finance the tuition and book costs for college.

(21) Three vocational experts testified in this case on the impact of claimant's work related injuries on her ability to find work in the open labor market and to earn wages. Maurice L. Entwistle and Dan Goldstein testified on behalf of the respondent while Monty Longacre testified on behalf of the claimant.

(22) Mr. Entwistle did not personally interview the claimant but based his conclusions on medical reports and vocational rehabilitation reports supplied to him by the respondent. Mr. Entwistle opined claimant had lost approximately 25 percent of her ability to perform work in open labor market and approximately 16 percent of her earning capacity. He used a combination of Dr. Aly M. Mohsen's and Dr. Daniel R. Wilson's permanent restrictions. But, his opinion did not take into consideration that claimant had obtained a GED or had completed any college courses.

(23) Monty Longacre personally interviewed claimant on March 19, 1994. He was provided with medical reports from Lowry Jones, Jr., M.D.; Daniel R. Wilson, M.D.; Frederick A. Hutton, M.D.; and Aly M. Mohsen, M.D.; along with the FCE dated February 3, 1994. Various vocational rehabilitation reports were also furnished. Utilizing Dr. Wilson's sedentary work restrictions, Mr Longacre opined claimant had lost 97 percent of her ability to perform work in the open labor market and retained only the ability to earn minimum wage for a 55 percent wage loss.

In formulating his opinions, Mr. Longacre concluded claimant was capable pre-injury of performing work in the heavy physical demand category of the Dictionary of Occupational Titles (DOT) and Dr. Wilson's work restrictions eliminated all jobs requiring claimant to reach with her arms and hands in any direction.

(24) Mr. Goldstein interviewed claimant on November 25, 1996. He had the medical records of Daniel R. Wilson, M.D., and the FCE dated February 3, 1994. Mr. Goldstein also possessed a copy of claimant's college transcript. Mr. Goldstein believed the claimant could perform some post-injury jobs within the light physical demand category. Also, because of claimant's college credits, Mr. Goldstein opined that claimant had the ability to perform unskilled, semi-skilled, and a part of the skilled job base. Because of claimant's receiving a GED and her college credits, Mr. Goldstein concluded that claimant had not lost any ability to perform work in the open labor market but had increased her ability by 10 percent.

Further, Mr. Goldstein believed claimant's college level training had left her with the ability to earn comparable wages.

(25) Based on a six-day work week, claimant's submission letter to the Administrative Law Judge proposed an average weekly wage of $491.03. This was based on fringe benefit costs estimated at a guess of $35 per week from previous cases claimant's attorney had experienced with respondent. Also included in this average weekly wage was overtime and weekly bonus amounts determined from a wage statement, admitted into evidence at the regular hearing, showing claimant's earnings from the week ending January 25, 1992, through the week ending August 1, 1992.

(26) In contrast, in its submission brief to the Administrative Law Judge, respondent proposed an average weekly wage of $379.84 which included overtime time pay of $39.30 per week and other pay of $10.14 per week. The straight time hourly wage of $8.26, the overtime, and other pay were obtained from the wage statement admitted into evidence at the regular hearing.

In its brief before the Appeals Board, the respondent argued yet another average weekly wage in the amount of $363.84[1] which included the regular wage of $8.26 per hour times 40 hours or $330.40, plus overtime in the amount of $38.12, other pay of $.74, bonus of $2.59, and insurance fringe benefits in the amount of $7.99.

(27) Claimant was questioned at the regular hearing if she was expected to be available to work on Saturdays. She replied, "Yeah, sometimes." Claimant further testified the majority of the year she did not work on Saturdays.

CONCLUSIONS OF LAW

(1) The claimant has the burden of proof to establish his or her right to an award of compensation and to prove the various conditions on which his or her right depends. *See* K.S.A. 1991 Supp. 44-501(a).

(2) The Appeals Board is limited to a review of the evidence presented and established before the Administrative Law Judge. *See* K.S.A. 1998 Supp. 44-555c(a).

(3) Despite respondent's failure to produce the requested wage information, the amount of claimant's average gross weekly wage is not an exception to claimant's burden of proof. The only evidence in the record of claimant's pre-injury average weekly wage that was introduced before the Administrative Law Judge was a wage statement admitted into evidence at the regular hearing. That wage statement covered a period from the week ending January 25, 1992, through the week ending August 1, 1992. Both claimant and

[1]Addition error, these components total $379.84 rather than $363.84.

respondent computed their various average weekly wage amounts utilizing figures from that wage statement. The wage statement, however, contains weeks after claimant's stipulated accident date of January 14, 1992, instead of the 26 week period preceding the date of accident as required by K.S.A. 1991 Supp. 44-511(b)(4), which provides for the method to obtain the average weekly overtime pay.

(4) However, both parties argued that the wage amounts contained on that wage statement should be used to calculate the claimant's pre-injury average weekly wage. Accordingly, because there is no other evidence contained in the record, the Appeals Board will also utilize this wage statement to compute claimant's pre-injury average weekly wage.

(5) On the date of claimant's accident, January 14, 1992, claimant was earning $7.86 per hour working 40 hours per week. The Appeals Board concludes claimant failed to prove she was expected to be available to work on Saturdays and regularly worked on Saturdays as the claimant proved in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). Claimant averaged $29.48 per week overtime pay in the 12 weeks she worked pursuant to the wage statement. She also earned a yearly bonus of $134.61 during this period which amounted to $2.59 per week. She further earned other pay which was not vacation or holiday pay which amounted to $2.96 per week. Accordingly, claimant's pre-injury average weekly wage included regular pay at $314.40 plus overtime pay of $29.48, bonus of $2.59, and other pay $2.96 for a total of $349.43.

(6) Although claimant injured her upper extremities performing repetitive work activities over a period of time for respondent, the parties stipulated that the appropriate date of accident for this claim was January 14, 1992. On that date, K.S.A. 1991 Supp. 44-510e(a) defined permanent partial general disability benefits as follows:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.

(7) However, K.S.A. 1991 Supp. 44-510e(a) further provided that there shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the employee's pre-injury average weekly wage.

(8) The Administrative Law Judge found that claimant's voluntary abandonment of the vocational rehabilitation plan which was being provided by the respondent was tantamount to a refusal to accept accommodated employment at a comparable wage and invoked the policy considerations announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Therefore, the Administrative Law Judge limited claimant's entitlement to permanent partial disability benefits based upon the stipulated permanent functional disability rating of 15 percent.

The Appeals Board disagrees with the Administrative Law Judge. The record is clear that after claimant was released to return to work with permanent restrictions the respondent never offered claimant employment within those restrictions.

The respondent did offer claimant a vocational rehabilitation plan which she completed except for the requirement of cooperating with the vocational rehabilitation counselor in a job search.

However, the Appeals Board concludes the record as a whole establishes that claimant does not possess the ability to earn a post-injury wage comparable to the wage she was earning while she was employed by the respondent. Therefore, the Appeals Board concludes, since claimant is attending college in a good faith effort to attain the ability to find employment, the no work disability presumption does not apply and she is entitled to a work disability award.

(9) The Appeals Board concludes the most credible and persuasive evidence of claimant's post-injury ability to perform work and earn wages is the opinion of vocational expert Monty Longacre. Maurice Entwistle's opinions are disregarded because his opinions were based on the aggregate of the restrictions of Dr. Mohsen and Dr. Wilson. Dr. Mohsen did not testify in this case and his restrictions are therefore not in evidence. *See* Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997). Also, the Appeals Board concludes Mr. Entwistle's labor market loss opinion was arbitrary and not based on sound vocational principles. He summarily used a labor market loss of 25 percent where an injured worker has repetitive motion restrictions.

(10) In regard to Mr. Goldstein's vocational opinions, the Appeals Board concludes claimant's GED and college credits failed to qualify claimant for the human service worker jobs as proposed by Mr. Goldstein. Those jobs are in the light physical demand categories and claimant is limited to sedentary work as restricted by her treating physician, Dr. Wilson. Additionally, all of those jobs also exceeded claimant's restrictions as they required claimant to have the physical ability to restrain young juveniles.

(11) The Appeals Board concludes that Mr. Longacre's overall vocational opinions were the most persuasive but also finds some problems with his conclusions. First, in arriving at claimant's 97 percent loss of ability to perform work in the open labor market, Mr. Longacre found claimant had the pre-injury ability to perform jobs within the heavy physical demand category of the DOT. Those jobs would require claimant to have the physical ability to lift up to 100 pounds occasionally and 50 pounds frequently. Claimant never performed work, pre-injury, in that category and also because of her small physical size, 5'3" tall, weighing 115 pounds, the Appeals Board concludes it is not reasonable to think claimant would have performed jobs in the heavy demand category.

Additionally, the Appeals Board questions Mr. Longacre's opinion that Dr. Wilson's restrictions eliminate claimant from all jobs in the DOT that require reaching activities. Therefore, the Appeals Board concludes claimant's pre-injury labor market did not include the physical demand work categories of heavy (9.14%) and very heavy (.72%) as listed in the DOT. Her pre-injury labor market then consisted of sedentary (10.96%), light (49.59%), and medium (29.59%) which totals 90.14% of the jobs listed in he DOT. Thus, claimant's pre-injury adjusted labor market consisted of sedentary (12.16%), light (55.01%) and medium (32.83%) physical demand work categories. Because the record does not contain accurate information to further adjust these physical demand levels for claimant's skill level or her repetitive upper extremity work restrictions, the Appeals Board concludes claimant has lost her ability to perform the light and medium work categories and has retained her ability to perform the sedentary work category for an 88 percent labor market loss.

(12) Mr. Longacre found claimant's ability to earn wages, post-injury, was limited to performing jobs that paid minimum wage. The Appeals Board agrees with that conclusion. The current minimum wage is $5.15 per hour and imputes to a post-injury average weekly wage of $206 per week. Comparing the $206 post-injury average weekly wage with claimant's pre-injury average weekly wage of $349.43 produces a 41 percent wage loss. Averaging the 88 percent labor market loss with the 41 percent wage loss entitles the claimant to a 64.5 percent work disability. *See* Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(13) The Appeals Board affirms the Administrative Law Judge's conclusion that the respondent should be assessed the cost of the May 19, 1995, preliminary hearing.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated March 4, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Amy L.

Burroughs, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury sustained on January 14, 1992, and based upon an average weekly wage of $349.43.

Claimant is entitled to 71.59 weeks of temporary total disability compensation (which includes 3 weeks of TPD converted to 1.88 weeks of TTD) at the rate of $232.96 per week or $16,677.61, followed by 343.41 weeks of permanent partial compensation at the rate of $150.26 per week or $51,600.78 for a 64.5% permanent partial general disability, making a total award of $68,278.39.

As of February 25, 1999 there is due and owing claimant 71.59 weeks of temporary total disability compensation at the rate of $232.96 per week or $16,677.61, followed by 299.55 weeks of permanent partial compensation at the rate of $150.26 per week in the sum of $45,010.38 for a total of $61,687.99, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,590.40 is to be paid for 43.86 weeks at the rate of $150.26 per week, until fully paid or further order of the Director.

Contained in the Division of Workers Compensation file is an attorney lien filed by claimant's former attorney, Diane F. Barger.

All authorize medical expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this _____ day of February 1999.

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BOARD MEMBER PRO TEM

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Topeka, KS
Gregory D. Worth, Lenexa, KS
Jennifer Daniels, Dakota City, NE
Diane F. Barger, Wichita, KS
Jon L. Frobish, Administrative Law Judge

Philip S. Harness, Director